

## Chapter 10 Investment

### Article 10.1: Definitions

For the purposes of this Chapter:

- (a) **Centre** means the International Centre for Settlement of Investment Disputes (ICSID) established by the ICSID Convention;
- (b) **claimant** means an investor of a Party that is a party to an investment dispute with the other Party;
- (c) **disputing parties** means the claimant and the respondent;
- (d) **disputing party** means either the claimant or the respondent;
- (e) **enterprise** means an enterprise as defined in Article 2.1(f) (Definitions of General Application – General Definitions), and a branch of an enterprise;
- (f) **enterprise of a Party** means an enterprise constituted or organised under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there;
- (g) **freely usable currency** means freely usable currency as determined by the International Monetary Fund under its *Articles of Agreement*;
- (h) **ICSID Additional Facility Rules** means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*;
- (i) **ICSID Convention** means the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, done at Washington, March 18, 1965;
- (j) **investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
  - (i) an enterprise;
  - (ii) shares, stock, and other forms of equity participation in an enterprise;
  - (i) bonds, debentures, loans and other debt instruments<sup>10-1</sup>; but do not include a debt instrument of a Party or of a state enterprise;

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<sup>10-1</sup> Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

- (iv) futures, options and other derivatives;
- (v) rights under contract, including turnkey, construction, management, production, concession, or revenue-sharing contracts;
- (vi) intellectual property rights;
- (vii) rights conferred pursuant to domestic law, such as concessions, licences, authorisations, and permits;<sup>10-2</sup> and
- (viii) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

but investment does not mean an order or judgment entered in a judicial or administrative action;

- (k) **investor of a non-Party** means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party;
- (l) **New York Convention** means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958;
- (m) **non-disputing Party** means the Party that is not a party to an investment dispute;
- (n) **respondent** means the Party that is a party to an investment dispute;
- (o) **Secretary-General** means the Secretary-General of ICSID;
- (p) **tribunal** means an arbitration tribunal established under Article 10.19 or 10.26; and
- (q) **UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law.

## Section A - Investment

### Article 10.2: Scope and Coverage<sup>10-3</sup>

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<sup>10-2</sup> Whether a particular right conferred pursuant to domestic law, as referred to in subparagraph (vii), has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the domestic law of the Party. Among such rights that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with such right has the characteristics of an investment.

<sup>10-3</sup> For greater certainty, this Chapter is subject to and shall be interpreted in accordance with Annexes 10-A through 10-D.

1. This Chapter applies to measures adopted or maintained by a Party relating to:
  - (a) investors of the other Party;
  - (b) covered investments; and
  - (c) with respect to Article 10.7 all investments in the territory of the Party.
2. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.
3. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to measures adopted or maintained by a Party relating to the provision of that cross-border service. This Chapter applies to that Party's treatment of the posted bond or financial security to the extent that such bond or financial security is a covered investment.
4. This Chapter does not apply to:
  - (a) measures adopted or maintained by a Party to the extent that they are covered by Chapter 12 (Financial Services); and
  - (b) any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement, except as provided in Annex 10-E paragraph 2.

### **Article 10.3: National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

### **Article 10.4: Most-Favoured-Nation Treatment<sup>10-4</sup>**

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<sup>10-4</sup>For greater certainty, Article 10.4 does not apply to the dispute settlement procedures set out in Section B of this Chapter, including requirements as to time.

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

**Article 10.5: Minimum Standard of Treatment<sup>10-5</sup>**

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
- (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

**Article 10.6: Treatment in Case of Strife**

1. Notwithstanding Article 10.9.5(b), each Party shall accord to investors of the other Party, and to covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife treatment no less favourable than that it accords, in like circumstances, to:

- (a) its own investors and their investments; or
- (b) investors of any non-Party and their investments.

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<sup>10-5</sup>For greater certainty, Article 10.5 shall be interpreted in accordance with Annex 10-A.

2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred to in paragraph 1, suffers a loss in the territory of the other Party resulting from:

- (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or
- (b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation or both in the event of a partial restitution, which in any case shall be prompt, adequate, and effective, and with respect to compensation, in accordance with paragraphs 2 to 4 of Article 10.11, *mutatis mutandis*.

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 10.3 but for Article 10.9.5(b).

## **Article 10.7: Performance Requirements**

### *Mandatory Performance Requirements*

1. Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or
- (g) to supply exclusively from the territory of the Party the goods that it produces or the services that it supplies to a specific regional market or to the world market.

### *Advantages Subject to Performance Requirements*

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
- (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

### *Exceptions and Exclusions*

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
- (b) Paragraph 1(f) does not apply:
- (i) when a Party authorises use of an intellectual property right in accordance with Article 31<sup>10-6</sup> of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
  - (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws<sup>10-7</sup>.
- (c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or

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<sup>10-6</sup>The reference to Article 31 includes footnote 7 to Article 31.

<sup>10-7</sup>The Parties recognise that a patent does not necessarily confer market power.

investment, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

- (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;
  - (ii) necessary to protect human, animal, or plant life or health; or
  - (iii) related to the conservation of living or non-living exhaustible natural resources.
- (d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
- (e) Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), do not apply to government procurement.
- (f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any requirement other than the requirements set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

#### **Article 10.8: Senior Management and Boards of Directors**

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions individuals of any particular nationality.

2. A Party may require that a majority or less of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

#### **Article 10.9: Non-Conforming Measures**

1. Articles 10.3, 10.4, 10.7, and 10.8 do not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:
  - (i) the central level of government, as set out by that Party in its Schedule to Annex I;

- (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or
    - (iii) a local level of government;
  - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
  - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 10.3, 10.4, 10.7, and 10.8.
2. Articles 10.3, 10.4, 10.7, and 10.8 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.
3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.
4. Articles 10.3 and 10.4 do not apply to any measure that is an exception to, or derogation from, the obligations under Article 17.5 (National Treatment – Intellectual Property Chapter) as specifically provided for in that Article.
5. Articles 10.3, 10.4, and 10.8 do not apply to:
- (a) government procurement; or
  - (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

#### **Article 10.10: Transfers<sup>10-8</sup>**

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:
- (a) contributions to capital;

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<sup>10-8</sup> For greater certainty, Article 10.10 is subject to Annex 10-C.

- (b) profits, dividends, interest, capital gains, royalty payments, management fees, and technical assistance and other fees;
- (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- (d) payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement;
- (e) payments made pursuant to paragraphs 1 and 2 of Article 10.6 and Article 10.11; and
- (f) payments arising under Section B.

2. Each Party shall permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the Party and a covered investment or an investor of the other Party.

3. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer.

4. Notwithstanding paragraphs 1 to 3, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures or derivatives;
- (c) criminal or penal offences;
- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

5. Notwithstanding paragraph 2, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

#### **Article 10.11: Expropriation and Compensation<sup>10-9</sup>**

1. Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (“expropriation”), except:

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<sup>10-9</sup>For greater certainty, Article 10.11 shall be interpreted in accordance with Annex 10-B.

- (a) for a public purpose;
  - (b) in a non-discriminatory manner;
  - (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 to 4; and
  - (d) in accordance with due process of law.
2. Compensation shall:
- (a) be paid without delay;
  - (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);
  - (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
  - (d) be fully realisable and freely transferable.
3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.
4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:
- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus
  - (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.
5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such revocation, limitation, or creation is consistent with Chapter 17 (Intellectual Property).

#### **Article 10.12: Special Formalities and Information Requirements**

1. Nothing in Article 10.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 10.3 and 10.4, a Party may require an investor of the other Party, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its domestic law.

### **Article 10.13: Denial of Benefits**

Subject to prior notification and consultation, a Party may deny the benefits of this Chapter to an investor of the other Party and to investments of that investor if the investor is an enterprise:

- (a) owned or controlled either by persons of a non-Party or of the denying Party;  
and
- (b) has no substantive business operations in the territory of the other Party.

## **Section B - Investor-State Dispute Settlement**

### **Article 10.14: Scope of Investor-State Dispute Settlement**

Section B applies where there is a dispute between a Party and an investor of the other Party relating to a covered investment made in the territory of a Party in accordance with its laws, regulations and investment policies.

### **Article 10.15: Consultations and Negotiations**

1. In the event of an investment dispute, the claimant and the respondent shall initially seek to resolve the dispute through consultations and negotiations, which may include the use of non-binding, third-party procedures. Such consultations shall be initiated by a written request for consultations delivered by the claimant to the respondent.

2. The parties shall endeavour to commence consultations within 30 days of receipt by the respondent of the request for consultations, unless the disputing parties otherwise agree.

3. With the objective of resolving an investment dispute through consultations, a claimant shall make all reasonable efforts to provide the respondent, prior to the commencement of consultations, with information regarding the legal and factual basis for the investment dispute.

4. For greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal.

#### **Article 10.16: Submission of a Claim to Arbitration**

1. If an investment dispute has not been resolved within six months of the receipt by the respondent of a request for consultations:

- (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim that:
  - (i) the respondent has breached an obligation under Section A; and
  - (ii) the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim that:
  - (i) the respondent has breached an obligation under Section A; and
  - (ii) the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:

- (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
- (b) for each claim, the provision of this Agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

3. A claimant may submit a claim referred to in paragraph 1:

- (a) under the ICSID Convention, provided that both the non-disputing Party and the respondent are parties to the ICSID Convention;

- (b) under the ICSID Additional Facility Rules, provided that either the non-disputing Party or the respondent, but not both, is a party to the ICSID Convention;
  - (c) under the UNCITRAL Arbitration Rules; or
  - (d) if the disputing parties agree, to any other arbitration institution or under any other arbitration rules.
4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration") is received under the applicable arbitral rules.
5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.
6. The claimant shall provide with the notice of arbitration referred to in paragraph 4:
- (a) the name of the arbitrator that the claimant appoints; or
  - (b) the claimant's written consent for the Secretary-General to appoint the claimant's arbitrator.

#### **Article 10.17: Consent of each Party to Arbitration**

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.
2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall be deemed to satisfy the requirements of:
- (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;
  - (b) Article II of the New York Convention for an "agreement in writing"; and
  - (c) Article 1 of the UNCITRAL Arbitration Rules.

#### **Article 10.18: Conditions and Limitations on Consent of each Party**

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 causing loss or damage to a claimant or covered investment.

2. No claim may be submitted to arbitration under this Section unless:
  - (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
  - (b) the notice of arbitration referred to in Article 10.16.6 is accompanied:
    - (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver; and
    - (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers,

of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to the events alleged to give rise to the claimed breach.

3. No claim may be submitted to arbitration, if the claimant referred to in Article 10.16.1(a) or 10.16.1(b), has alleged the breach of an obligation under Section A in proceedings before a court or an administrative tribunal of a Party, or other binding dispute settlement procedure. For greater certainty, if an investor elects to submit a claim, of the type previously described to a court or administrative tribunal of the Party, that election shall be definitive and the investor may not thereafter submit the claim to arbitration under this Section.

4. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

5. Neither Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Party shall have consented to submit or have submitted to conciliation or arbitration under Article 10.17, unless such other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

#### **Article 10.19: Selection of Arbitrators**

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties and who shall be a national of a third country.

2. Arbitrators shall have expertise or experience in public international law, international trade or international investment rules, and be independent of, and not be affiliated with or take instructions from, either Party or the claimant.
3. The Secretary-General shall serve as appointing authority for an arbitration under this Section.
4. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.
5. Pursuant to paragraph 1, where the disputing parties have agreed on a sole arbitrator or each individual member of the tribunal and one or more of those arbitrators has the nationality of one of the disputing parties, the appointment shall be in writing.
6. Subject to paragraph 7:
  - (a) the costs of arbitration shall be born equally by the disputing parties unless the tribunal decides otherwise; and
  - (b) the prevailing ICSID rate for arbitrators shall apply.
7. The disputing parties may establish rules relating to expenses incurred by the tribunal, including arbitrators' remuneration.
8. Even without the consent of the tribunal that he or she was a member, where any arbitrator appointed as provided for in this Section resigns or becomes unable to act, a successor shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.

#### **Article 10.20: Conduct of the Arbitration**

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 10.16.3(b), (c) or (d). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.
2. The tribunal shall have the authority to accept and consider *amicus curiae* written submissions that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party (the "submitter"). The submissions shall be provided in both Spanish and English, and shall identify the submitter and any Party, other government, person, or organisation, other than the submitter, that has provided, or will provide, any financial or other assistance in preparing the submission. Where such submissions are admitted by the tribunal, the tribunal shall provide to the parties an opportunity to respond to such written submissions.

3. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the jurisdiction or the competence of the tribunal, a tribunal shall address and decide as a preliminary question any objection by the respondent that the claim is manifestly without legal merit.

- (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration referred to in Article 10.16.4, the date the tribunal fixes for the respondent to submit its response to the amendment).
- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
- (c) The respondent does not waive any objection as to the jurisdiction or competence of the tribunal or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in the following paragraph.

4. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 3 or any objection that the dispute is not within the tribunal's jurisdiction or competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period of time, which may not exceed 30 days.

5. When it decides a respondent's objection under paragraph 3 or 4, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

6. A respondent may not assert as a defence, counterclaim, right of set-off, or otherwise that the claimant has received or will receive indemnification or other compensation for all or part of the alleged loss or damages pursuant to an insurance or guarantee contract.

7. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16. For the purposes of this paragraph, an order includes a recommendation.

8. At the request of a disputing party, a tribunal shall, before issuing an award on liability, transmit its proposed award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed award, only the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed award. The tribunal shall consider any such comments and issue its award not later than 45 days after the expiration of the 60 day comment period.

#### **Article 10.21: The non-disputing Party**

1. No later than 30 days after the date that such documents have been delivered to the respondent, the respondent shall deliver to the non-disputing Party a copy of:

- (a) the notice of intent referred to in Article 10.16.2;
- (b) the notice of arbitration referred to in Article 10.16.4;
- (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to paragraphs 2 and 3 of Article 10.20 and Article 10.26;
- (d) minutes or transcripts of hearings of the tribunal, where available;
- (e) orders, awards, and decisions of the tribunal; and
- (f) any other document submitted to the tribunal, including redacted versions of confidential documents submitted in accordance with Article 10.22.

2. On written notice to the disputing parties, the non-disputing Party may make a submission to a tribunal on any question of interpretation of this Agreement.

3. The non-disputing Party receiving confidential information pursuant to paragraph 1 shall treat the information as if it were a disputing party.

#### **Article 10.22: Transparency of Arbitral Proceedings**

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, make them available to the public at their cost:

- (a) the notice of intent referred to in Article 10.16.2;
- (b) the notice of arbitration referred to in Article 10.16.4;
- (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to paragraphs 2 and 3 of Article 10.20, Article 10.21.2 and Article 10.26;
- (d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure including closing the hearing for the duration of any discussion of confidential information.

3. Nothing in this Section requires a respondent to disclose information which would impede law enforcement or information that is privileged or otherwise protected from disclosure under a Party's law or to furnish or allow access to information that it may withhold in accordance with Article 22.2 (Security Exceptions – General Provisions and Exceptions Chapter) or Article 22.5 (Disclosure of Information – General Provisions and Exceptions Chapter).

4. Information that may be designated as confidential information is limited to any sensitive factual information that is not available in the public domain.

5. Confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law shall, if such information is submitted to the tribunal, be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the same time that it submits a document containing information claimed to be confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law, submit a redacted version of the document that does not contain the information. Only the redacted version shall be made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may:

(i) withdraw all or part of its submission containing such information; or

- (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c).

In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under subparagraph (d)(i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under subparagraph (d)(ii) of the disputing party that first submitted the information.

6. A disputing party may disclose to other persons in connection with the arbitral proceedings such confidential documents as it considers necessary for the preparation of its case, but it shall require that any confidential information in such documents is protected.

7. Nothing in this Section authorises a respondent to withhold from the public information required to be disclosed by its laws.

#### **Article 10.23: Governing Law**

1. Subject to paragraph 2, when a claim is submitted under Article 10.16.1(a) or Article 10.16.1(b), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. A decision of the Joint FTA Committee issuing its interpretation of a provision of this Agreement under Article 20.1.3(f) (Joint FTA Committee – Institutional Arrangements Chapter) shall be binding on a tribunal established under this Section, and any award must be consistent with that decision.

#### **Article 10.24: Interpretation of Annexes**

1. Where a respondent asserts as a defence that the measure alleged to be a breach is within the scope of a non-conforming measure set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Joint FTA Committee on the issue. The Joint FTA Committee shall submit in writing any decision issuing its interpretation under Article 20.1.3(f) (Joint FTA Committee – Institutional Arrangements Chapter) to the tribunal within 60 days of delivery of the request.

2. A decision issued by the Joint FTA Committee under paragraph 1 shall be binding on the tribunal, and any award must be consistent with that decision. If the Joint FTA Committee fails to issue such a decision within 60 days, the tribunal shall decide the issue.

#### **Article 10.25: Expert Reports**

Without prejudice to the appointment of other kinds of experts where authorised by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report

to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

### **Article 10.26: Consolidation**

1. Where two or more claims have been submitted separately to arbitration under Article 10.16.1 and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order with the agreement of all the disputing parties sought to be covered by the order or in accordance with the terms of paragraphs 2 to 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

- (a) the names and addresses of all the disputing parties sought to be covered by the order;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Subject to paragraph 5, unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall be constituted in accordance with Article 10.19 except that, for the purpose of Article 10.19.1, the claimants shall appoint a single arbitrator by agreement.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General may be requested by any disputing party sought to be covered by the order, to appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the arbitrator to be appointed by the Secretary-General may be a national of the respondent, and if the claimants fail to appoint an arbitrator, the arbitrator to be appointed by the Secretary-General may be a national of the Party other than the respondent.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 10.16.1 have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims;
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
- (c) instruct a tribunal previously established under Article 10.19 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:
  - (i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4 and 5; and
  - (ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 10.16.1 and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

- (a) the name and address of the claimant;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with Section B of this Agreement.

9. A tribunal established under Article 10.19 shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 10.19 be stayed, unless the latter tribunal has already adjourned its proceedings.

### **Article 10.27: Awards**

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest;

- (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs and attorneys' fees in accordance with this Section and the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 10.16.1(b):

- (a) an award of restitution of property shall provide that restitution be made to the enterprise;
- (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
- (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A tribunal may not award punitive damages.

4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

6. A disputing party may not seek enforcement of a final award until:

- (a) in the case of a final award made under the ICSID Convention:
  - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
  - (ii) revision or annulment proceedings have been completed; and
- (b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 10.16.5(d):
  - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
  - (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

7. Each Party shall provide for the enforcement of an award in its territory.

8. A disputing party may seek enforcement of an arbitration award under the ICSID Convention, or the New York Convention regardless of whether actions have been taken under Article 10.18.5.

9. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

#### **Article 10.28: Service of Documents**

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 10-F.

## **Annex 10-A**

### **Customary International Law**

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers, for the purposes of this Agreement, to all customary international law principles that protect the economic rights and interests of aliens.

## **Annex 10-B Expropriation**

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
2. Article 10.11.1 addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 10.11.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
  - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
    - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
    - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
    - (iii) the character of the government action.
  - (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

## **Annex 10-C**

### **Transfers**

#### **Chile**

1. Chile reserves the right of the Central Bank of Chile (*Banco Central de Chile*) to maintain or adopt measures in conformity with Law 18.840, Constitutional Organic Law of the Central Bank of Chile (*Ley 18.840, Ley Orgánica Constitucional del Banco Central de Chile*) or other legislation, in order to ensure currency stability and the normal operation of domestic and foreign payments. For this purpose, the Central Bank of Chile is empowered to regulate the supply of money and credit in circulation and international credit and foreign exchange operations. The Central Bank of Chile is empowered as well to issue regulations governing monetary, credit, financial, and foreign exchange matters. Such measures include, *inter alia*, the establishment of restrictions or limitations on current payments and transfers (capital movements) to or from Chile, as well as transactions related to them, such as requiring that deposits, investments or credits from or to a foreign country, be subject to a reserve requirement (*encaje*).
2. Notwithstanding paragraph 1, the reserve requirement that the Central Bank of Chile can apply pursuant to Article 49 N° 2 of Law 18.840, shall not exceed 30 per cent of the amount transferred and shall not be imposed for a period which exceeds two years.
3. When applying measures under this Annex, Chile, as established in its legislation, shall not discriminate between Australia and any third country with respect to transactions of the same nature.

**Annex 10-D**  
**DL 600**

**Chile**

1. The obligations and commitments contained in this Chapter do not apply to Decree Law 600, Foreign Investment Statute (*Decreto Ley 600, Estatuto de la Inversión Extranjera*) (hereinafter referred to in this Annex as “DL 600”), and to Law 18.657, Foreign Capital Investment Fund Law (*Ley 18.657, Ley de Fondos de Inversión de Capital Extranjero*), to the continuation or prompt renewal of such laws, to amendments to those laws or to any special and/or voluntary investment regime that may be adopted in the future by Chile.
2. For greater certainty, it is understood that the Foreign Investment Committee of Chile has the right to accept and reject applications to invest through DL 600 and Law 18.657. Additionally, the Foreign Investment Committee has the right to regulate the terms and conditions of foreign investment under DL 600 and Law 18.657.
3. Notwithstanding paragraphs 1 and 2, Chile shall accord to an investor of Australia or its investment that is a party to an investment contract under DL 600, the better of the treatment required under Section A of this Chapter or the treatment under the investment contract.
4. Chile shall permit an investor of Australia or its investment that has entered into an investment contract under DL 600 to amend the investment contract to make it consistent with the obligation referred to in paragraph 3.
5. Notwithstanding any other provision in this Agreement, Chile may prohibit an investor of Australia or a covered investment from transferring from Chile proceeds of the sale of all or any part of an investment made pursuant to a contract under DL 600 for up to one year after the date that the investor or covered investment transferred funds to Chile to establish the investment.

## **Annex 10-E**

### **Termination of the Bilateral Investment Agreement**

1. Without prejudice to paragraph 2, the Parties agree that the “Agreement between the Government of Australia and the Government of the Republic of Chile on the Reciprocal Promotion and Protection of Investments”, and its Protocol, signed in Canberra on 9 July 1996, (hereafter the “IPPA”), will terminate on the date of entry into force of the present Agreement.
2. The IPPA shall continue to apply to any investment (as defined in the IPPA) which was made before the entry into force of this Agreement with respect to any act, fact or situation which originated before the entry into force of this Agreement.
3. Notwithstanding paragraph 2, an investor may only submit a claim under Article 11 of the IPPA (Settlement of disputes between a Contracting Party and an investor of the other Contracting Party) within three years from the date of entry into force of this Agreement.
4. The Parties agree that this Annex constitutes an amendment to Article 12 of the IPPA and is effective to terminate the IPPA.

**Annex 10-F**  
**Service of Documents on a Party under Section B**

**Australia**

Notices and other documents in disputes under Section B shall be served on Australia by delivery to:

*Department of Foreign Affairs and Trade*

**Chile**

Notices and other documents in disputes under Section B shall be served on Chile by delivery to:

*Dirección de Asuntos Jurídicos del Ministerio de Relaciones  
Exteriores de la República de Chile  
Teatinos 180  
Santiago, Chile*